(7)

(1)

Supreme Court, U.S.
FILED
JUL 09 2007
OFFICE OF THE CLERK

No. 07-84

IN THE

Supreme Court of the United States

Pamela L. Bickford,
Petitioner

v.

State of Alaska, Department of Education and Early Development, and Shirley J. Holloway, Commissioner of Education,
Respondents

On Petition For Writ Of Certiorari
To The Supreme Court of the State of Alaska

PETITION FOR WRIT OF CERTIORARI

Pamela L. Bickford
Pro Se
16840 Tide View Drive
Anchorage, Alaska 99516
Telephone (907) 345-7731

QUESTION PRESENTED

The questions presented, are:

1. When a State education agency is presented with written notification of allegations claiming a long-standing, system-wide, problem with the evaluation of students for special education services demanding resolution for a class of children with disabilities, but requests disparate remedies - should a State education agency take additional steps to allow complainants an opportunity to provide additional information or clarification - before returning the complaint?

2. Under State complaint resolution procedures, 34 C.F.R. §§ 300.660-300.662, may a state agency return a complaint and require complainants to re-file the complaint, which resets the date notification is presented to the agency, or does the original date toll the presentment and statute of limitations?

3. Whether a State education agency has oversight of Section 504 claims that parallel claims brought under the IDEA?

4. Whether an individual aggrieved by the decision of a state agency complaint investigator has a right of appeal within the administrative procedures to satisfy exhaustion requirements?

5. Whether, under 20 U.S.C. § 1412(a)(11), a general requirement that a state education agency is obligated to ensure that federal statutory and regulatory requirements are met, may other state officials – in this case, an Assistant Attorney General of the Department of Law – intervene on behalf of the State education agency?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Cited Authorities iv

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provision Involved 2

Statement of the Case 5

A. Statutory Framework 5

B. Factual and Procedural Background 9

Reason for Granting the Writ 14

Conclusion 18

APPENDIX:

Appendix A
Supreme Court of the State of Alaska Order
April 11, 2007 . . . . . App. 1

Appendix B
Supreme Court of the State of Alaska Opinion[1]
February 9, 2007 . . . . . App. 2-20

---

[1] The Alaska Supreme Court's Opinion, at footnotes 8, 9, 10, 17, 28 and 29, makes numerous erroneous references to the "current version" of the State complaint resolution regulations citing 34 C.F.R. §§ 300.151-300.153. The correct citation is 34 C.F.R. §§ 300.660-300.662 (2006).

Appendix C
Superior Court of the State of Alaska Order
November 11, 2004 . . . . . App. 21

Appendix D
Superior Court of the State of Alaska Order
October 4, 2004 . . . . . App. 22-31

Appendix E
Commissioner of Education Dismissal Decision
August 20, 1999 . . . . . App 32

Appendix F
Complaint Investigation Report
August 5, 1999 . . . . . App. 33-44

Appendix G
Department of Education Letter
June 1, 1999 . . . . . App. 45-46

Appendix H.
U.S. Department of Education, Office of
Special Education and Rehabilitative Services
OSEP Memorandum 94-16
March 22, 1994 . . . . . App. 47-54

TABLE OF AUTHORITIES

Page

CASES:

Alden v. Maine, 527 U.S. 706 (1999) 6

Amanda v. Clark County Sch. Dist.,
267 F.3d 877 (9th Cir. 2001) 7

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) . . 18

Auer v. Robbins, 519 U.S. 452 (1997) 8

Board of Education v. Rowley, 458 U.S. 176 (1982) . . . 7, 20

Cedar Rapids Comm. Sch. Dist. V. Garret F.,
526 U.S. 66 (1999) 7

Commissioner v. Brown, 380 U.S. 563 (1965) 18

Collinsgru v. Palmyra Bd. of Educ.,
161 F.3d 225 (3rd Cir. 1998) 10

County of Los Angeles v. Smith,
88 Cal.Rptr.2d 159 (Cal.App.2Dist. 1999) 17

County of San Diego v. Cal. Special Educ. Hearing
93 F.3d 1458 (9th Cir. 1996) 18

Dunajski v. Keegan, No. CIV 99-0353 (D.C.Ariz.2001) . . 13

Green v. Mansour, 474 U.S. 64 (1985) 6

Hoeft v. Tucson Unified Sch. Dist.,
967 F.2d 1298 (9th Cir. 1992) 8, 9, 20

Honig v. Doe, 484 U.S. 305 (1988) 7

King v. County of Los Angeles,
633 F.2d 876 (9th Cir. 1980) 6

Lucht v. Molalla River Sch. Dist.,
225 F.3d 1023 (9th Cir. 2000) 8

TABLE OF AUTHORITIES (Continued)

McCarthy v. Madigan, 503 U.S. 140 (1992) 9

McKart v. United States, 395 U.S. 185 (1969) 20

Morrissey v. Brewer, 408 U.S. 471 (1972) 19

Ojai Unified Sech Dist. V. Jackson,
4 F.3d 1467 (9th Cir. 1993) 18

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 8

Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) . .6

Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978) . . 17

United States v. Turkette, 452 U.S. 576 (1981) 17

Wenger v. Canastota Cent. Sch. Dist.,
146 F.3d 123 (2nd Cir 1998) 19

Winkelman v. Parma City Sch. Dist.,
127 S.Ct. 1994 (May 21, 2007) 10

STATUTES AND REGULATIONS

20 U.S.C. § 1221e-3 . . . . . 2, 8
20 U.S.C. § 1400, et seq. 5, 6
20 U.S.C. § 1400(c) 7
20 U.S.C. § 1400(d), ... 7
20 U.S.C. § 1412(a)(1) 2, 7
20 U.S.C. § 1412(a)(7) 3, 12
20 U.S.C. § 1412(a)(11) 3, 15, 17
20 U.S.C. § 1412(a)(12) 17
20 U.S.C. § 1414(b)(3)(B) 3, 5, 15
20 U.S.C. § 1415 8
20 U.S.C. § 1415(b)(6) 7
20 U.S.C. § 1415(d) 8
20 U.S.C. § 1415(f) 7
20 U.S.C. § 1415(i)(1)(A) 7

TABLE OF AUTHORITIES (Continued)

STATUTES and REGULATIONS

20 U.S.C. § 1415(i)(2)(A) 8
20 U.S.C. § 1415(*l*) 4, 8, 19
29 U.S.C. § 701 6
29 U.S.C. § 794 . . . . . 4, 5, 6, 15
42 U.S.C. § 2000d-7 6

28 C.F.R. § 35.170 15
34 C.F.R. § 34 104.6(b) 15
34 C.F.R. § 104.35(b)(1) 5
34 C.F.R. § 300.530 15
34 C.F.R. § 300.531-300.536 15
34 C.F.R. § 300.532(c)(1)(ii) 15
34 C.F.R. §§ 300.660-300.662 . . . . . 8, 10, 11, 12, 15, 16

MISCELLANEOUS

OSEP Memorandum 94-16, ... 8, 9, 12
Senate Report No. 94-168 (1975) 17
Education Department General Administrative Regulations. 8
Alaska Rules of Appellate Procedure, Rule 602(b) 2
AS 14.07.145 16
AS 44.17.010 16
AS 44.17.040 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Pamela L. Bickford, respectfully petitions for a writ of certiorari to review and vacate in full - (1) the dismissal order of the Supreme Court of the State of Alaska; (2) the Superior Court's affirmation of administrative dismissal; (3) the Commissioner of Education's dismissal, (4) the Complaint Investigator's Report; and (5) the administrative decision to separate the overlapping Section 504 and ADA claims from the IDEA claims in this case. Petitioner respectfully petitions this Court to provide additional instructions to remand this case to the primary jurisdiction of the Alaska Department of Education and Early Development to allow complainants to amend their original complaint and proceed under State complaint resolution procedures on all claims.

Further, petitioner respectfully petitions this Court to provide additional instruction with regards to the standard of review applicable to cases brought under the Individuals with Disabilities Act in state court actions when directed to appeal to state court, not federal court, by a State education agency.

OPINIONS BELOW

The order of the Supreme Court for the State of Alaska (App. B, *infra*, 2-20) is reported at 115 P.3d 302 (Alaska 2007). The Superior Court's order (App. D, *infra*, 22-31) is unreported. The Department of Education's Complaint Investigation Report (App. F, *infra*, 33-44) is unreported.

STATEMENT OF JURISDICTION

The Complaint Investigation Report, App. F, *infra*, 33a-44a, was filed on August 5, 1999 found no violation of law yet recommended the original complaint be re-submitted. The decision to dismiss the complaint by the Commissioner of the Department of Education, App. E, *infra*, 32a, was entered on August 20, 1999 with notification of right to appeal

to the State Superior Court according to Rule 602(b) of the Alaska Rules of Appellate Procedure. The Superior Court entered judgment for respondent on October 4, 2004. App. D, *infra*, 22a-31a. The Superior Court denied appellant's motion to alter or amend judgment, App. C, *infra*, 21a. The Supreme Court for the State of Alaska entered judgment for respondent on February 9, 2007. App. B, *infra*, 2a-20a. The Supreme Court for the State of Alaska denied rehearing on April 11, 2007. App. A, *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 1221e-3. General authority of the Secretary of Education, under the functions of the U.S. Department of Education, 20 U.S.C. § 1221 *et seq.*, provides:

> The Secretary, in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, and subject to limitations as may be otherwise imposed by law, is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department.

Section 1412(a) – State eligibility, of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, provides:

> A State is eligible for assistance under this subchapter for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:
>
> > (1)(A) A Free appropriate public education is available to all children with disabilities residing in the State . . .

Section 1412(a) – State eligibility, of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, specific to evaluation provides:

> (7) Children with disabilities are evaluated in accordance with subsections (a) through (c) of section 1414 of this title.

Section 1412(a) State eligibility, of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, provides:

> (11)(A) The State educational agency is responsible for ensuring that –
> (i) the requirements of this subchapter are met; and
> (ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State or local agency -
> (I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and (II) meet the educational standards of the State educational agency.

Section 1414(b)(3)(B) of the IDEA, referenced above in section 1412(a)(7) provides:

> [A]ny standardized tests that are given to the child –
> (i) have been validated for the specific purpose for which they are used;
> (ii) are administered by trained knowledgeable personnel; and
> (iii) <u>are administered in accordance with any instructions provided by the producer of such tests</u> (emphasis added).

Section 1415(*l*) Rule of Construction, of the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*, provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 *et seq.*], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 *et seq.*], or any other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

29 U.S.C. § 794, herein referenced as Section 504, provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ... The head of each agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. ... [T]he term "program or activity" means all of the operations of – (1)(A) a department, agency, ... of a State ... or (B) the entity of such State or local government that distributes such assistance and each such department or agency ... to which the assistance is extended, in the case of assistance to a State or local government...

STATEMENT

Eight parents with the compiled evaluations of their thirteen children attempted to correct a long-standing systemic evaluation practice they alleged to be contrary to the IDEA, Section 504, and the ADA as these Acts of Congress provide overlapping evaluation protections, in that "any standardized tests that are given to [a] child . . . are administered in accordance with any instructions provided by the producer of such tests." 20 U.S.C. § 1414(b)(3)(B); "in conformance with the instructions provided by their producer," 34 C.F.R. § 104.35(b)(1); and all three Acts of Congress provide the opportunity for individuals to raise complaints with the supervising agency. Parent, Pamela Bickford, contacted the publisher of the test to confirm that the allegedly erroneous practice was "not in conformance with the instructions provided" by the test producer. EOR 1-6. Parents attempted to bring their concerns to the attention of both the local school district and the State Department of Education, and became frustrated when neither agency would address their concerns. EOR 7-11. Robyn Rehmann, of the Anchorage School District, asked the Department to undertake a general review of testing procedures, appending to her request, a photocopy of the section of the Anchorage Special Education Handbook relating to evaluation procedures, an exact match to the State Handbook. EOR 12. Parents, suspecting that relying on the Anchorage School District's request would result in an unreviewable dead-end, set out to challenge the offending evaluation "practice" against both agencies parents contacted previously with their information and concerns.

A. Statutory and Regulatory Framework

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, contains an "anti-discrimination mandate" that was enacted to "enlist[] all programs receiving federal funds" in Congress's attempt to eliminate discrimination against indi-

viduals with disabilities. *School Bd. Of Nassau County v. Arline*, 480 U.S. 273, 286, 277 (1987). Congress found that - "[I]ndividuals with disabilities constitute one of the most disadvantaged groups in society," and that they "continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communications, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. § 701(a)(2) & (a)(5) (emphasis added).

Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). A "program or activity" is defined to include "all of the operations" of a state agency, "any part of which is extended Federal financial assistance." 29 U.S.C. § 794(b). Protections under Section 504 are limited to "otherwise qualified" individuals. *Arline*, 480 U.S. at 287.

Section 504 may be enforced through private suits against programs or activities receiving federal funds. *King v. County of Los Angeles*, 633 F.2d 876, 878 (9th Cir. 1980). Congress conditioned the receipt of federal financial assistance on the state agencies' waiver of Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 2000d-7. This Court held that remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. *Green v. Mansour*, 474 U.S. 64, 68 (1985). Further, this Court held established rules provide ample means to correct ongoing violations of law and vindicate interests which animate the Supremacy Clause. *Alden v. Maine*, 527 U.S. 706, 757(1999).

The Individuals with Disabilities Education Act (IDEA), 84 Stat. 175, as amended, was enacted, in part, "to assure that all children with disabilities have available to them ... a free

appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(c). Consistent with this purpose, the IDEA authorizes federal financial assistance to States that agree to provide disabled children with special education and "related services." 20 U.S.C. § 1400(d), 1412(a)(1). *See, Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999). The IDEA "confers upon disabled students an enforceable substantive right to public education in participating States, and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." *Honig v. Doe*, 484 U.S. 305, 310 (1988) (citation and footnote omitted); *see also Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982) (holding that the EHA established right to public education for students with disabilities that "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction").

Among the most important of the IDEA's goals is the protection of "parents' right to be involved in the development of their child's educational plan." *Amanda v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir. 2001). Toward this end, participating states are required to establish procedures giving parents "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). After making their complaint, parents are entitled to "an impartial due process hearing." *Id.* 1415(f). A decision of the due process hearing "shall be final," *Id.* 1415(i)(1)(A), except that "[a]ny party aggrieved by the findings and decision ... shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the

United States." *Id.* 1415(i)(2)(A). These procedures, including the available appeal, must be explained to parents in writing upon the filing of an administrative complaint. *Id.* 1415(d).

Before bringing a suit based on a violation under the IDEA, a complainant must normally exhaust the due process hearing procedures required by 20 U.S.C. § 1415. The exhaustion requirement also applies to suits under "other Federal laws protecting the rights of children with disabilities . . . seeking relief that is also available under" IDEA. 20 U.S.C. § 1415(*l*). The application of the IDEA's statutory exhaustion requirement is predominantly a question of law that is reviewed *de novo*. *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992).

Distinct from the IDEA's due process requirements, the U.S. Department of Education promulgated regulations pursuant to its general rulemaking authority requiring each recipient of federal funds, including funds provided through the IDEA, to put in place a complaint resolution procedure (CRP). *See*, App., *infra*, 47a-54a. 34 C.F.R. §§ 300.660-300.662 (citing 20 U.S.C. § 1221e-3 as authority for rules); *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023, 1029 (9th Cir. 2000) (adding "The regulations originated as part of the Education Department General Administrative Regulations ("EDGAR")). App., *infra*, 47a-54a.

The CRP "is a creature of the [Department's] own regulations, [its] interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989). According to the U.S. Department of Education, the CRP is intended to "*allow* [parents and school districts] to resolve differences without resort to more costly and litigious resolution through due process." *Assistance to States for the Education of Children With Disabilities*, 64

Fed.Reg. 12,406, 12,646 (March 12, 1999) (emphasis added); *see also* Office of Special Education Programs Memorandum 94-16 (March 22, 1994) (OSEP Memorandum 94-16 at App., *infra*, 47a-54a.) (describing that CRP regulations "are under the direct control of the SEA [State education agency]" App., *infra*, 51a, " have the potential for providing a less costly and more efficient mechanism for resolving disputes than is possible under the impartial due process hearing system" *Id.*, and "[f]or these reasons, effective implementation of the complaint management procedures will have a positive impact on both parents and public agencies"). *Id.*

On a case by case basis, a reviewing court may choose to require or to accept exhaustion of the CRP "as a *substitute* for exhausting IDEA procedures in challenges to facially invalid policies," *Hoeft*, 967 F.2d at 1308, as exhaustion is required even though due process hearing officers are not authorized to adjudicate questions of statutory compliance because "administrative exhaustion may be necessary to give the state a reasonable opportunity to investigate and correct such policies." *Id.* at 1307. However this Court has held, where the challenge is to a facially invalid policy, and the state refuses to alter the policy after a CRP complaint, then further exhaustion may be excused because "the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992).

B. Factual and Procedural Background

The parent's original complaint of October 1998 alleging violations of the IDEA, Section 504, and other grounds that potentially would impact a large class of individuals, was prepared from the forms books found at the local law library, without assistance of counsel. At the time parents submitted the complaint, Alaska provided a two-tier system for administrative due process hearings. 4 AAC 52.550 (1983). Parents erroneously assumed a complaint and request for a due proc-

ess hearing naming the State educational agency responsible for monitoring and compliance would justify a second-tier hearing, therefore they titled the document "Complaint and Request for a Due Process Hearing." App., *infra*, 5a. This was later found to be a request for disparate remedies, App., *infra*, 16a, and not correctable without re-filing.

Without inquiry or correspondence from state officials of the Department of Education, on November 17, 1998, the original complaint was returned by Assistant Attorney General Thomas Dahl. App., *infra*, 6a. The parents responded to Mr. Dahl's letter requesting clarification adding that it was their "intention to file this complaint in District Court in Anchorage as we believe the evaluation procedures employed by the Anchorage School District, and by other districts within the State of Alaska, deny learning disabled students their right to a free appropriate public education." App., *infra*, 7a. This correspondence was from Dahl (on Department of Law Letterhead) and, parents responded directly to Dahl. EOR 38-40, and 47-49. When there was no response from the Department of Law, in order to preserve their date of discovery, the case was filed, but District Court Judge Russel Holland dismissed the case without prejudice, citing *Collinsgru v. Palmyra Bd. Of Educ.*, 161 F.3d 225 (3rd Cir. 1998), as plaintiffs were not represented by counsel and non-attorney *pro se* parents were not allowed to represent the interests of their children in federal court.[2] App., *infra*, 9a, footnote 18.

When the revised State complaint resolution procedures, 34 C.F.R. §§ 300.660-300.662, were issued, parents realized the state agency had the authority under the complaint procedures to order compensatory services as a remedy.[3] On May

---

[2] *See*, recent reversal of Collinsgru, *Winkelman v. Parma City School District*, 127 S Ct 1994 (May 21, 2007)

[3] *See*, Adoption of State Complaint Procedures (§300.660), Fed Reg., Vol. 64, No. 48 (March 12, 1999), page 12646 (Also provided to the Complaint Investigator, see App., *infra*, 35a [her report cites the page number as 12464], which states

16 and May 24, parents then filed with the State education agency, a second and third complaint; separating Section 504 and ADA claims from the IDEA claims. App., *infra*, 9a, 34a, and 35a. To safeguard their original date of discovery, the original 1998 complaint was appended to both complaints. App., *infra*, 9a, 34a, 35a, and 39a.

Penny Beiler, Human Resource Manager for the Department of Education, responded to the Section 504 complaint by stating:

> "The Department of Education has no responsibility for oversight of Section 504 and ADA compliance at the local school district level. Your complaint should be directed to the Office of Civil Rights." App., *infra*, 45a.

Likewise, Wendy Tada, the Manager for Special Education Programs, responding to the third complaint stated that the "Department has no responsibility for oversight of complaints alleging violations of Section 504 or the ADA at the local district level." EOR 68.[4] On June 16, following a teleconference, Ms. Tada summarized the participants agreement "that the issue to be the subject of the complaint investigation" to be

> "Did the Department of Education follow the complaint procedures as required by the IDEA?" App., *infra*, 10a.

> "The note merely reflected what has always been the case – that SEAs have the authority to order compensatory services in appropriate circumstances as a remedy for violations of Part B in resolving complaints under the procedures in §§ 300.660-300.662." Further on the same page, "[a] State's general supervisory responsibility is not satisfied by relying on private enforcement efforts through due process actions for all issues that could be the subject of a due process hearing. In addition, the State complaint process and mediation provide parents and school districts with mechanisms that allow them to resolve differences without resort to more costly and litigious resolution through due process."

[4] Alaska Supreme Court Excerpt of Record ("EOR").

The Complaint Investigation Report was issued on August 5, 1999, ending with the comment - "this investigator would encourage the complainant to re-submit the complaint to the appropriate department, being sure to follow the instructions provided in the Notice of Procedural Safeguards: Parental Rights for Special Education booklet." App., *infra*, 44a. On August 20, 1999, in response to Bickford's inquiry, the Commissioner of Education, dismissed the complaint and directed aggrieved complainants to appeal the decision within 30 days to the Superior Court. App., *infra*, 32a.

Further research into the distinction between what issues are appropriate for an administrative complaint versus a due process hearing, resulted in receiving a copy of *Memorandum 94-16* from the U.S. Department of Education. App., *infra*, 47a. Memorandum 94-16 clearly states that the State complaint management procedures are available for resolving "any complaint that meets the requirements of §300.662, including (1) complaints that raise systemic issues, and (2) individual child complaints that are filed by parents" (emphasis in original). App., *infra*, 50a. On October 13, 2000, Bickford moved for remand, pursuant to AS 44.62.570(e) due to agency's notification error, or alternatively, to allow exhaustion by an AS 44.62.570(d) de novo hearing. EOR 106-114. Superior Court Judge Wolverton ordered the case remanded to the Department of Education "to conduct an evidentiary hearing to receive testimonial *and documentary evidence* that Appellant seeks to include in the record, with transcripts to be added to the record on appeal and allowance for additional briefing." EOR 120, App., *infra*, 11a. Jonathan Katcher, Hearing Officer for the Department of Education, in preliminary proceedings stated:

> "This court doesn't have jurisdiction for compensatory education for a whole bunch of other children. And, you are not a lawyer and cannot advocate on behalf of other children," EOR 159, and, further

> "If an investigation were to discern some sort of practice that needed to be corrected with future conduct and a requirement laid down by the state educational agency requiring the local school district to behave differently in the future then yes, that's within the proper scope of a complaint investigation." EOR 160.

The evidentiary hearing was held December 3-4, 2003. EOR 171. A transcript was not prepared as all of appellant's proposed documents were excluded and witnesses that were allowed to testify were limited by attorney-client and work-product doctrines by both participating Assistant Attorney Generals. App., *infra*, 12a.

On January 3, 2004, Bickford filed a motion for summary judgment requesting the original document, attached - corrected and amended, be remanded to the agency for resolution. App., *infra*, 12a. The last attachment was the Consent Decree and Notice of Settlement in a similar case, *Dunajski v. Keegan*, No. CIV 99-0353 PCT RCB (D.C. Arizona 2001), which provided guidelines and sample notification letters for all stages of a State complaint resolution procedure. EOR 200. Assistant Attorney General Slotnick, photocopied the "corrected complaint" from the court documents and delivered it to Art Arnold, Special Education Director for the Department of Education, who requested clarification to initiate complaint proceedings with a "three-year look-back period." EOR 222 Bickford spoke with AAG Slotnick by telephone regarding Art Arnold's request, and he agreed to convey appellant's hesitation to act outside the jurisdiction of the Superior Court. EOR 221.

The Superior Court order dismissing the complaint was entered on October 4, 2004. App., *infra*, 22a-31a. On October 14, 2004, Bickford filed a timely motion to alter or amend the dismissal. The Superior Court denied Bickford's motion to amend on November 11, 2004. App., *infra*, 21a. Bickford filed a timely notice of appeal on November 15, 2004 to the Supreme Court of Alaska. The Supreme Court filed the Order affirming the Superior Court's and the De-

partment's dismissal of the complaint on February 9, 2007. App., *infra*, 2a-20a. Bickford filed a petition for rehearing on February 20, 2007, which was denied by the Supreme Court on April 11, 2007. App., *infra*, 1a.

REASONS FOR GRANTING THE WRIT

1. A State educational agency, responsible for general supervision under IDEA, should take additional steps to allow clarification before a complaint is returned.

Petitioner respectfully submits that the history of this case show the agency's action or inaction, as the case may be, conflict with its obligation to maintain supervision and compliance with federal and state law. When the Department received the third complaint requesting "disparate remedies," it responded to the written complaint and gave parents the opportunity to amend missing documents, App. *infra*, 35a, as petitioner contends should have been the response to the parent's first complaint.

Because, the original systemic claims of erroneous evaluations and discrimination have never been addressed or resolved, and neither the Alaska Department of Education, nor the Alaska Court System, have moved to "independently" protect the interests of the class of children with disabilities, this petition for writ of certiorari follows, as only this Court can intervene in this matter.

2. A State Complaint Management System is the proper jurisdiction within which to raise systemic issues protected by both Section 504 and the IDEA.

The Alaska State Supreme Court affirmed the dismissal of this case, in part "because the original complaint raised issues beyond the department's jurisdiction," App., *infra*, 2a; and "that Bickford's new complaint seemed to include allegations of ADA and section 504 violations, which the de-

partment had no authority to address." App., *infra*, 9a. In general, both Section 504 of the Rehabilitation Act, and the IDEA, hold a State education agency - the recipient of Federal financial assistance, responsible for all educational programs within the state. 29 U.S.C. § 794, and 20 U.S.C. § 1412(a)(11). All three Acts of Congress provide complaint procedures are to be in place. 28 C.F.R. § 35.170; 34 C.F.R. § 104.6(b); and 34 C.F.R. §§ 300.660-300.662.

Section 504 prohibits qualified individuals from being denied the benefits of a service, program, or activity, or being subjected to discrimination by any such entity. *Id.* § 794. A system-wide method of conducting evaluations of children with disabilities that fails to diagnose their specific educational needs, because the test is not administered in conformance with the instructions provided by the test producer, facially violates 34 C.F.R. § 104.35(b)(1), and will unfairly deny some children with disabilities services they would otherwise qualify for, thereby subjecting them to discrimination.

The IDEA requires the State education agency, not the local school district, "shall ensure that each public agency establishes and implements procedures that meet the requirements of §§ 300.531-300.536," 34 C.F.R. § 300.530; 20 U.S.C. § 1414(b)(3); and 1412(a)(7). In addition, the underlying evaluation complaint - that evaluations were not administered "in accordance with any instructions provided by the producer of the tests," 34 C.F.R. § 300.532(c)(1)(ii) violates rights of children with disabilities to an appropriate education because their educational program will not be tailored to their individual needs, as they were incorrectly diagnosed.

Assistant Attorney General Dahl, Penny Beiler, Wendy Tada, Complaint Investigator Barats, the Superior Court, and finally the State Supreme Court; were collectively in error. The State Complaint Management System was the only administrative forum tailored to address "any" systemic issue. App., *infra*, 50a.

The Anchorage School District's offer and subsequent insistence to set a due process hearing, and Petitioner's refusal and attempts to correct the error, have been criticized at every review. The Due Process Hearing System on the other hand, is better suited to discrete, technical disputes regarding a single child. In this case, the school district asserted an IDEA due process hearing would be necessary for each and every child. EOR 35. Petitioner respectfully submits the State education agency had a duty to remedy the harm done to all of the children with disabilities wrongfully evaluated under its supervision and requiring parents to re-file, limiting issues to the IDEA and their specific children was contrary to the law.

Only this Court can bring the required uniformity regarding the exhaustion requirements under the IDEA, Section 504, and the ADA when the three Acts of Congress overlap.

3. Requiring complainants to re-file a complaint is contrary to CRP procedures as it resets the date the issue was brought to the attention of a supervising agency.

The State complaint management regulations, 34 C.F.R. §§ 300.660-300.662, contain a timeline within which the procedure is to be completed and allows for exceptional circumstances. The CRP does not provide for re-filing. Petitioner can find no case law to support this interpretation. In the interests of protecting the interpretation of the CRP regulations, all decisions finding that re-filing was an appropriate avenue that was erroneously not taken - must be vacated, and the matter returned to the agency for complaint resolution.

4. The Attorney General had no authority to intervene on behalf of State education agency officials.

The Commissioner of Education, as the principal executive officer, AS 14.07.145, may assign functions vested in the department to subordinate officers and employees, AS 44.17.010, under the supervision, direction, and control of the

principal executive officer, AS 44.17.040. The IDEA places primary responsibility on State education agencies as they alone are "responsible for ensuring the grant requirements are met," 20 U.S.C. § 1412(a)(11), ensuring local education agencies comply with those requirements, *Id.* § 1412(a)(12). Congress intended State education agencies "assure a single line of responsibility with regard to the education" of children with disabilities, *Senate Report No. 94-168* (1975).

The Assistant Attorney Generals assigned to the Department is not under the supervision, direction, or control of the Commissioner of Education. In the State of Alaska, the Attorney General provides guidance and represents state agencies in legal matters, but serves the Governor. The Alaska Supreme Court makes light of Bickford's argument that any action by the Assistant Attorney General (returning the complaint) was beyond the "primary jurisdiction" of the State education agency, App. *infra*, 14a, and therefore impermissible under the IDEA.

In the majority of states, the Attorney General is elected to office and serves to guard the public's interest. An Attorney General under those circumstances would never allow a State education agency to disregard its lawful obligations and might instead advise or take action to guard the public interest. In this case, Assistant Attorney General Dahl intervention diverted already confused parents from the procedural track that would resolve their concerns.

In interpreting a statute, the U.S. Supreme Court has emphasized the importance of avoiding "absurd results"[5] or

---

[5] The California State Appellate Court in *County of Los Angeles v. Smith*, 88 Cal.Rptr.2d 159, 163 (Cal App 2 Dist 1999) cites the United States Supreme Court in *United States v. Turkette*, 452 U.S. 576, 580 (1981)

> "Authoritative administrative constructions should be given the deference to which they are entitled, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978), *Commissioner v.*

"unreasonable results whenever possible."[6] The focus of the complaint investigation was directed to actions of the Assistant Attorney General who returned the October 1998 complaint to Bickford, diverting the attention from the absence of action by state education agency officials responsible for, and ultimately obligated to, ensure that all children with disabilities have available to them " a free appropriate public education" designed to meet their individual needs.[7] The statute provides federal funds to states to accomplish this goal, but "conditions such funding on compliance with certain goals and procedures."[8] As the recipient of federal financial assistance, the Department must be held responsible for supervision of itself and local education agencies receiving federal funds from the state education agency. The State complaint resolution procedures are a principle avenue for notification of potential violations of law under the primary jurisdiction of the Department and provides that the Department is to remedy denial of appropriate services[9] without requiring resort to an impartial hearing[10] and without requiring "repre-

---

Brown, 380 U.S. 563, 571 (1965). We nevertheless begin with the language of the statute.

[6] *County of Los Angeles*, citing *American Tobacco Co. v. Patterson*, 456 U S 63, 71 (1982):

> "Statutes should be interpreted to avoid untenable distinctions and unreason-able results whenever possible."

[7] *County of San Diego v. Cal. Special Educ. Hearing*, 93 F.3d 1458, 1461 (9th Cir. 1996).

[8] *Ojai Unified School Dist. v. Jackson*, 4 F 3d 1467, 1469 (9th Cir. 1993)

[9] 34 CFR § 300.660(b) (1999), the U S. Department of Education in discussing changes in the regulations as a result of the recent elimination of the notes states:

> "The note merely reflected what has always been the case – that SEAs have the authority to order compensatory services in appropriate circumstances as a remedy for violations of Part B in resolving complaints under the procedures in §§ 300.660-300.662."

Federal Register, Vol. 64, No. 48, 12646

[10] Exc. 272, OSEP Memorandum 94-16 (March 22, 1994)

sentation" by counsel to ensure the interests of all similarly affected children are protected.

Remand to the administrative agency returns the case to the primary jurisdiction of the supervising agency, avoids setting an absurd or unreasonable precedent as to procedure and policy, and forces the Department to remedy their shortcomings with regards to all children with disabilities affected by the alleged violation of law and their parents who unknowingly failed to initiate an administrative complaint or administrative hearing to correct the erroneous evaluation "practice" with regards to their child's education, a common-law remedy for educational harm.

5. A complainant, under the State Complaint Resolution Procedures, aggrieved by a state complaint investigation report has a right of appeal within administrative procedures to satisfy exhaustion requirements.

Only this Court can determine whether the regulations providing for Alaska State complaint resolution procedure fail to provide sufficient due process at the administrative level. To do this it must clarify a complainant's right to appeal for an impartial administrative review of adverse determinations made by State complaint investigators. Generally, an appellant is required to exhaust available administrative remedies to provide a reviewing court a case ripe for review. *See*, 20 U.S.C. § 1415(*l*). This Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972), found "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.*, at 481. And, State complaint procedures are not sufficient to exhaust administrative remedies, *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123 (CA2 1998).

The doctrine of exhaustion under IDEA serves several purposes: permitting the exercise of agency discretion and expertise on issues requiring those characteristics; allowing full development of technical issues and a factual record prior to court review; preventing deliberate disregard and circum-

vention of agency procedures established by Congress, and, avoiding unnecessary judicial decisions by giving the agency the first opportunity to correct any errors. See, *McKart v. United States,* 395 U.S. 185, 193-95 (1969). This exhaustion requirement applies not only to IDEA claims, but also to any other federal claims seeking relief that would be available under the IDEA, *Hoeft v. Tucson Unified School District*, 967 F.2d 1298, 1302-03 (9th Cir. 1992), (finding that failure to exhaust administrative procedures deprives the court of subject-matter jurisdiction).

As these published decisions are reviewed by the general public and may be cited and interpreted in a manner that may confound the purposes of law; and because the decision below is erroneous in that it makes no reference to this Court's IDEA review standard in *Rowley*, whether "the State complied with the procedures set forth in the Act" and, whether the substantive requirements were met, *Id,* 458 U.S. 176, 206-07 (1982), deferring instead to appellate procedures under State law, requiring only that a reviewing court apply its independent judgment; without regard to *Rowley*, petitioner prays certiorari be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Pamela L. Bickford
Pro Se
16840 Tide View Drive
Anchorage, Alaska 99516
Telephone (907) 345-7731

July 9, 2007